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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. TIMOTHY L. HANRETTY, Defendant and Appellant.	A140220 (San Mateo County Super. Ct. No. SC076240A)

Defendant Timothy Hanretty appeals from a restitution order entered following his conviction by plea of misappropriation of public funds. Defendant, the former assistant superintendant of the Woodside Elementary School District (District), fraudulently obtained a $2.6 million loan on behalf of the District, after the District approved only a $600,000 loan. The full amount of the loan was used on a modernization project benefitting the District. The court ordered defendant to pay approximately $2 million in restitution to the District, the difference between the loan proceeds and the approved amount. Defendant asserts this amounts to a double recovery for the District, which received the full benefit of the $2.6 million loan. We disagree, and affirm.

PROCEDURAL AND FACTUAL BACKGROUND

Defendant was charged with misappropriation of public funds by a public official, forgery, and filing a forged instrument. (Pen. Code, §§ 424, subd. (a)(4); 470, subd. (d); 115, subd. (a).)[1] The complaint alleged the amount misappropriated from the District exceeded $1.3 million within the meaning of section 12022.6, subdivision (a)(3). The

[1] All further statutory references are to the Penal Code unless otherwise indicated.

complaint further alleged neither the victim school district nor law enforcement had actual or constructive knowledge of the violation prior to November 8, 2011, within the meaning of section 803, subdivision (c)(1), regarding the statute of limitations.

Because defendant pleaded no contest, we take the following facts from the probation report. "Records of the District Attorney's Office, Bureau of Investigations, reveal that on December 8, 2011, . . . the Woodside School District Superintendent, Beth Polito, and their attorney met with an inspector to discuss a possible crime involving an unauthorized loan made on behalf of the Woodside School District. Ms. Polito and the school district's attorney explained that in 2005, the Woodside School District took on a modernization project that was to a voter-approved bond measure (of approximately $12,500,000) to fund the project. At the time, the defendant was employed by the Portola Valley School District as the superintendent and it was through a job-sharing agreement between the two districts that the defendant was able to do work for the Woodside School District. The Woodside School District board approved Resolution 488 authorizing a loan of $632,000, with a 10-year term [as part of the modernization project to update an athletic field and facilities]. The loan was executed in December of 2007 by the defendant on behalf of the school district. Unbeknownst to the school board, the defendant presented fraudulent paperwork to obtain the loan indicating that the board had approved a loan not to exceed $3,000,000 and obtained a loan for $2,600,000 and agreed to a repayment schedule totaling $4,331,073.11 with interest. Over the next several months, the defendant regularly updated the school board advising that the project was on budget. After the project was completed, the board voted to give the defendant a $5,000 bonus for completing the project on time and on budget.

"In the fall of 2011, the Woodside School District Board asked the current school Superintendent, Beth Polito, to provide their current debt schedule. The debt schedule provided by the district to the board was over the budgeted amount. The Chief Business Officer found that the original authorized loan for $632,000 was changed to a loan of $2,600,000. According to officials, there was no authorization for the defendant to execute the loan for a different amount. The defendant's actions caused the Woodside

School District to incur an additional $2,000,000 in unauthorized debt. A forensic audit was conducted and the initial report revealed that all the money was spent on the project.

"Based on a thorough investigation, it was concluded that the defendant provided a false/forged copy of Resolution 488 to Municipal Financial Asset Finance Corporation to secure an unauthorized loan of $2,600,000 payable over 253 monthly payments. With interest, the total payments would equal $4,331,073.11. The defendant's criminal conduct began upon the signing and subsequent presentation of Resolution 488. The date Resolution 488 was signed was on November 13, 2007.

"On January 20, 2012, the defendant met with an inspector from the District Attorney's Office. The defendant admitted to falsifying the resolution and fraudulently obtaining an unauthorized $2,600,000 loan. During the interview, the defendant indicated that he did not receive any personal gain, and explained that the 2.6 million dollar amount was a forecasted deficit amount. The defendant stated that the school board was 'dysfunctional' and they had pressured Dan Vinson (deceased superintendent) to get the modernization project done, and that the forged check was 'a result of that.' When asked who changed the resolution, the defendant stated, 'Dan did it but I was there with him.' He explained that both he and Mr. Vinson wanted to get the project done and, 'Make sure the community was well served.' He added, 'It wasn't honest and in violation of things I'm sure.' [¶] On January 30, 3012, the defendant submitted his formal resignation letter."

Defendant pleaded no contest to misappropriation of public funds and admitted the section 803 allegation.[2] The court sentenced him to a two-year prison term, and ordered him to pay restitution to the Woodside Elementary School District in an amount to be determined at a restitution hearing.

The restitution hearing was held almost a year later, in September 2013. The school district initially sought restitution of $3,627,402.50. That amount included $67,783 in attorney fees, $31,173 for audit fees, and "over three million dollars for

[2] Defendant was charged in a separate case, not at issue in this appeal, with embezzlement from the Portola Valley School District.

additional loan principal and interest (21-year loan [of] $2,600,000 vs. 10-year loan [of] $632,000.)" At the time of the hearing, the District sought a reduced sum of $2,936,561 in restitution. That sum consisted of $76,220 in attorney fees, $35,788 in forensic accounting fees, $1,968,000 in additional loan principal and $856,553 in additional interest. The District reduced the amount of restitution initially sought because its counsel was able to renegotiate the interest rate on the loan. Counsel also had negotiated a $250,000 payment under District's employee fidelity insurance coverage, although the District did not reduce the restitution sought by this amount.

The court ordered defendant to pay $2,666,561 to the District, which took into account the savings due to renegotiation of the loan, the $250,000 insurance payment made to the District and the $20,000 restitution payment defendant had already made to the District.

DISCUSSION

Defendant claims the amount of restitution awarded was a windfall to the District, constituting a double recovery because the District retained the improvements purchased with the unauthorized $2 million portion of the loan. He also asserts the court failed to take into consideration the "time value of money" when ordering defendant to pay restitution based on loan payments that would not be due for "over a decade."[3]

Section 1202.4 provides in part: "It is the intent of the Legislature that a victim of crime who incurs an economic loss as a result of the commission of a crime shall receive restitution directly from a defendant convicted of that crime. [¶] . . . [¶] The court, in addition to any other penalty provided or imposed under the law, shall order the defendant to pay . . . [¶] . . . [¶] (B) Restitution to the victim or victims, if any, in accordance with subdivision (f), which shall be enforceable as if the order were a civil judgment." (§ 1202.4, subd. (a)(1)–(3).)

Subdivision (f) provides in part: "[I]n every case in which a victim has suffered economic loss as a result of the defendant's conduct the court shall require that the

[3] Defendant does not take issue with the portion of the restitution award for attorney fees or forensic accounting.

defendant make restitution to the victim or victims in an amount established by court order, based on the amount of loss claimed by the victim or victims or any other showing to the court. . . . The court shall order full restitution unless it finds compelling and extraordinary reasons for not doing so and states them on the record. . . . [¶] . . . [¶] (3) To the extent possible, the restitution order shall . . . be of a dollar amount that is sufficient to fully reimburse the victim or victims for every determined economic loss incurred as the result of the defendant's criminal conduct, including, but not limited to . . . [¶] (A)[f]ull or partial payment for the value of stolen or damaged property. The value of stolen or damaged property shall be the replacement cost of like property, or the actual cost of repairing the property when repair is possible." (§ 1202.4, subd. (f)(3).) Restitution shall include "[a]ctual and reasonable attorney's fees and other costs of collection accrued by a private entity on behalf of the victim." (§ 1202.4, subd. (f)(3)(H).)

A defendant is entitled to a restitution hearing to "dispute the determination of the amount of restitution." (§ 1202.4, subd. (f)(1).) As recently explained, " 'At a victim restitution hearing, a prima facie case for restitution is made by the People based in part on a victim's testimony on, or other claim or statement of, the amount of his or her economic loss. [Citations.] "Once the victim has [i.e., the People have] made a prima facie showing of his or her loss, the burden shifts to the defendant to demonstrate that the amount of the loss is other than that claimed by the victim." ' [Citations.]" (*People v. Chappelone* (2010) 183 Cal.App.4th 1159, 1172 (*Chappelone*).)

We review the trial court's restitution order for abuse of discretion. (*People v. Giordano* (2007) 42 Cal.4th 644, 663.) " ' " 'When there is a factual and rational basis for the amount of restitution ordered by the trial court, no abuse of discretion will be found by the reviewing court.' " [Citations.]' [Citation.] 'The court abuses its discretion when it acts contrary to law [citation] or fails to "use a rational method that could reasonably be said to make the victim whole, and may not make an order which is arbitrary or capricious." [Citation.]' [Citation.]" (*In re Travis J.* (2013) 222 Cal.App.4th 187, 202.)

The Alleged Windfall to the District

Defendant first claims the restitution award amounted to a windfall for the District because "the District received the benefit of $2 million in improvements and a restitution award for the entire cost of that $2 million loan." He also asserts the court should have applied the "special benefit" rule applied in the context of tort damages.

Defendant relies on *Chappelone, supra*, 183 Cal.App.4th 1159 to support his claim the award is a double recovery for the District. In that case, the defendant, an employee of Target, embezzled a large amount of merchandise over the course of several months. (*Id*. at pp. 1163, 1166.) Police recovered the bulk of the merchandise. (*Id*. at pp. 1166–1167.) The trial court ordered the defendant to pay restitution based on the retail value of the stolen merchandise, and allowed "Target to retain the recovered goods for disposal at its pleasure." (*Id.* at p. 1180.) The court held this was an abuse of discretion, "as a victim is not entitled to restitution for the value of property that was returned to him or her, except to the extent there is some loss of value to the property." (*Ibid*.) The court explained: "A restitution order is intended to compensate the victim for its actual loss and is not intended to provide the victim with a windfall." (*Id*. at p. 1172.)

Defendant also relies on *Heckert v. MacDonald* (1989) 208 Cal.App.3d 832 (*Heckert*), in which the court applied the analogous "special benefit" doctrine applicable in tort cases. That doctrine has been described as follows: " 'When the defendant's tortious conduct has caused harm to the plaintiff or to his property and in so doing has conferred a special benefit to the interest of the plaintiff that was harmed, the value of the benefit conferred is considered in mitigation of damages, to the extent that this is equitable.' [Citations.]" (*Heckert, supra*, 208 Cal.App.3d at p. 839.)

In *Heckert*, the sellers of an apartment building and the person who acted both as their managing agent and broker were sued by the buyers based on structural deficiencies in the building not disclosed by the broker. (*Heckert, supra*, 208 Cal.App.3d at pp. 834–835.) The agent/broker never informed the sellers, who were "fairly isolated" from the operation of the building, of those deficiencies. (*Id.* at pp. 834–836.) At trial, the court entered judgment for sellers on their cross-complaint for indemnification against the

broker. (*Id.* at p. 836.) Sellers then sought attorney fees from the broker based on the "tort of another" exception to the general rule that each party bear the cost of their own attorney fees. (*Ibid*.) On appeal, the court held the sellers were entitled to attorney fees under that doctrine, but any attorney fees sought must "be offset by the 'special benefit' conferred upon" the sellers resulting from the broker's tortious conduct. (*Ibid*.) The "special benefit" received by the sellers was the "substantial profit" based on the higher sales price resulting from the broker's failure to disclose deficiencies in the building. (*Id*. at p. 837.)

In the unusual factual circumstances of this case, however, retention of the improvements attributable to the $2 million unauthorized portion of the loan was not a benefit to the District. Although the District received more improvements than it had sought, they did not "benefit" the District because, unlike the benefits in *Chappelone* and *Heckert*, the improvements could not be liquidated. Despite defendant's suggestion that the District could have sold some picnic tables and playground equipment, there was no evidence before the court that these improvements could be separated from the property and disposed of in any way that would provide remuneration for the District. Unlike the situation in *Chappelone*, the District could not simply sell or donate the unwanted improvements, as Target could have with the recovered stolen goods. (*Chappelone*, *supra*, 183 Cal.App.4th at pp. 1180–1182.)

Indeed, the unwanted improvements were a detriment to the District. The District had approved a loan of only $600,000, and budgeted to repay a loan of that amount. As the court noted, "the school district is left with significant principal that they still owe and significant interest . . . ." The District was forced to retain the improvements, and was obligated to pay for them by repaying the higher, unauthorized loan amount. And the District was forced to forego other expenditures approved by the Board in order to service the debt on the unauthorized loan amount. Rather than a windfall to the District, the improvements paid for with the unauthorized loan proceeds were a millstone. The court's restitution order was not an abuse of discretion.

The "Time Value" of Money

Defendant asserts the trial court erred in failing to "take into account the time value of money" in making the restitution award. He relies on *People v. Pangan* (2013) 213 Cal.App.4th 574 (*Pangan*), in which the court held it was "an abuse of discretion not to account for the time value of money in determining a victim's economic loss" in awarding restitution, and that the defendant's counsel was ineffective in not raising the issue. (*Id*. at pp. 576, 582.)

In *Pangan*, the defendant was convicted of causing great bodily injury while driving under the influence. (*Pangan*, *supra*, 213 Cal.App.4th at p. 576.) The victim suffered serious medical injuries and was forced to retire early, resulting in a $246.50 decrease in his monthly pension payments. (*Id*. at p. 577.) The Court of Appeal explained "a lump sum now, reflecting future payments, must be discounted to reflect the fact the recipient is receiving the money now." (*Id*. at p. 582.) Thus, it held the trial court erred "in not accounting for the fact that possession of the money now, as distinct from the future, *is* worth something, and that something must be accounted for in order to arrive at the actual value of an economic loss." (*Ibid.*) The court held defendant had waived the issue by failing to object, but concluded defendant's trial counsel was ineffective in not raising it. (*Id*. at pp. 582–584.)

In *People v. Arce* (2014) 226 Cal.App.4th 924 (*Arce*), Division Four of this District disagreed, in part, with *Pangan*. In *Arce*, the defendant pleaded guilty to assault with a firearm. (*Id.* at p. 926.) The victim sought and was awarded, among other things, restitution for past and future lost wages due to the injuries he suffered. (*Id.* at p. 928.) The defendant claimed his counsel was ineffective in "not requesting that the trial court account for 'the time value of money' " in calculating the portion of the award meant to compensate the victim for future lost wages. (*Id*. at p. 929.)

The *Arce* court noted that in considering an ineffective assistance of counsel claim, " 'a reviewing court defers to counsel's reasonable tactical decisions, and there is a presumption counsel acted within the wide range of reasonable professional assistance.' [Citation.] . . . A reversal on direct appeal is warranted only if '(1) the record

affirmatively discloses counsel had no rational tactical purpose for the challenged act or omission, (2) counsel was asked for a reason and failed to provide one, or (3) there simply could be no satisfactory explanation.' [Citation.]" (*Arce, supra,* 226 Cal.App.4th at p. 930.) "Because the record . . . [was] silent as to why Arce's trial counsel did not seek a time-value discount," the court considered whether there could be satisfactory explanations for that failure. (*Id.* at pp. 930–931.) The court concluded "Arce's trial counsel may have not sought a time-value discount because of the applicable evidentiary burdens. . . . Arce's counsel, who was retained, may have concluded that the cost of presenting evidence to support the request was not worth a speculative reduction or would be greater than any potential reduction. Or he may have simply believed that raising the issue would undercut his primary argument that *no* future lost wages could be awarded." (*Id*. at p. 931, fn. omitted.) The court also disagreed with *Pangan's* "notion that a trial court has a duty to sua sponte apply a time-value reduction even when there is no evidence or stipulation to establish a discount rate or measure." (*Arce*, at p. 931, fn. 9.)

We agree with *Arce* as to waiver, ineffective assistance of counsel, and no sua sponte obligation to apply a time-value reduction. Here, defendant's trial counsel objected to the proposed amount of restitution on the bases the District was comparatively negligent in failing to supervise defendant, and it would constitute a double recovery to the District because it retained the improvements. He may have, as in *Arce*, believed raising the time-value of money argument would undercut his primary claims of comparative negligence and double recovery. Additionally, the trial court reduced the amount of restitution by $250,000, the amount the District received from its insurance company. The court made this reduction because it was equitable,[4] not because

[4] The court stated "The only reason . . . I think it would be fair to deduct that amount in this instance is the restitution amount is so high that it's not likely to get paid in full in the Court's judgment."

it was required,[5] and counsel may have concluded further challenges to the amount "might lead to increased scrutiny and a higher award." (*Arce*, *supra*, 226 Cal.App.4th at p. 931.)

In sum, it is possible defendant's counsel had reasonable tactical grounds for not seeking a time-value of money discount, and the trial court had no sua sponte duty to do so.

DISPOSITION

The restitution order is affirmed.

[5] "[T]he Legislature could rationally conclude that the criminal restitution scheme should always require the offender to pay the full cost of his crime, receiving no windfall from the fortuity that the victim was otherwise reimbursed . . . ." (*People v. Birkett* (1999) 21 Cal.4th 226, 246.)

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Banke, J.

We concur:

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Humes, P. J.

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Margulies, J.

A140220, *People v. Hanretty*